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No. 86-1108

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF VERMONT, PETITIONER

v.

RICK COX

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent's Fifth Amendment privilege against compelled self-incrimination was violated when respondent participated in a presentence interview after the probation officer told him she would not return if he chose to postpone the interview until he had consulted an investigator from the public defender's office.

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INTEREST OF THE UNITED STATES

The procedures for conducting presentence interviews involved in this case closely parallel the procedures used in the federal courts. See Fed. R. Crim. P. 32(c). Accordingly, the Court's decision in this case may affect the practice of federal probation officers in conducting presentence interviews with convicted defendants. In addition, the federal government has a significant interest in the interpretation of the Fifth Amendment privilege against compulsory self-incrimination and the scope of *Miranda* v.

Arizona, 384 U.S. 436 (1966), issues that are presented by the facts of this case.

STATEMENT

Respondent, who was originally charged with kidnapping, entered nolo contendere pleas to three counts of simple assault in the District Court of Vermont. Following respondent's entry of his plea, the district court ordered the probation officer to prepare a presentence report. To help her prepare the report, the probation officer scheduled an interview with respondent at the correctional institution where he was incarcerated (Pet. App. 2a). At the subsequent sentencing hearing, respondent's counsel described what happened when the probation officer arrived for the interview (Pet. App. 4a; J.A. 15):

> [W]hen the Probation Officer came to interview our client we in fact arranged for our investigator to go down and talk with him to prepare him for what would be coming forward, and he indicated to the Probation Officer that he really didn't want to talk to her until [the investigator on the case] was there. * * * And she indicated to him that that was fine but she wouldn't come back again. And made him feel as though he would have no opportunity to consult with us before talking with her.

Respondent then agreed to be interviewed. In the course of the interview, respondent discussed with the probation officer his drug-related activities (Pet. App. 6a-7a). The presentence report contained references to respondent's admissions about his prior involvement with drugs (J.A. 20-21, 22, 23).

At the sentencing hearing, respondent's counsel objected to the court's consideration of the presentence report. Counsel relied primarily upon a state court decision holding that a sentencing court may not rely on "mere assertions of criminal activity." In addition, counsel argued that some of respondent's admissions to the probation officer should not be considered by the court because if respondent had had an opportunity to speak with a representative of the public defender's office prior to the interview, he would have been advised not to make some of the admissions he made (J.A. 15). Counsel further asserted that "it must be Constitutionally necessary for the probation officer who is preparing a [presentence report] to * * * tell a defendant his rights he is waiving and what trouble he might get himself into by being fully open and not remaining silent" (J.A. 17).

The district court rejected counsel's arguments and accepted the presentence report with some redactions (J.A. 17-20). After giving respondent an opportunity to make a statement, which respondent refused (J.A. 21), the court imposed consecutive terms of 6 to 12 months' imprisonment on each of the three counts.

On appeal to the Vermont Supreme Court, respondent argued that the sentencing court erred by relying on information in the presentence report that was obtained in violation of respondent's privilege against compulsory self-incrimination and his right to counsel (Pet. App. 2a). The Vermont Supreme Court vacated the sentence on the basis of respondent's claim under the Fifth Amendment; the court therefore did not address his other claims (*ibid.*). The court first found that respondent's request to

consult with the investigator was equivalent to a request to consult with counsel (Pet. App. 5a).[1] It then rejected the State's argument that the Fifth Amendment privilege is inapplicable to presentence investigations (Pet. App. 4a) and its argument that respondent's decision to proceed with the interview constituted a waiver of the privilege (Pet. App. 4a-7a). The court noted that respondent "was presented with two choices: (1) to await the investigator and forfeit the interview, or (2) to proceed with the interview without additional advice" (Pet. App. 6a). As a result, the court concluded, the condition under which respondent continued with the presentence interview was coercive, which rendered respondent's statements involuntary, in violation of his Fifth Amendment rights (*ibid.*). Although the court referred in passing to the fact that respondent was incarcerated at the time of the interview, it did not consider whether *Miranda* warnings were necessary. As a remedy for the Fifth Amendment violation, the court vacated respondent's sentence and remanded for the preparation of a new presentence report and resentencing by a judge unfamiliar with the original report (Pet. App. 7a).

SUMMARY OF ARGUMENT

The Vermont Supreme Court was incorrect in holding that respondent's statements were obtained in violation of his Fifth Amendment privilege against compulsory self-incrimination. First, the choice presented to respondent—to participate in a presentence interview at the appointed time without the advice of his counsel's representative, or to forfeit the inter-

[1] The State does not challenge this determination, nor do we.

view completely—does not amount to compulsion within the meaning of the Fifth Amendment. Second, even if respondent is viewed as having been compelled to proceed with the interview, he voluntarily chose to provide information without asserting his Fifth Amendment privilege. The general rule is that the Fifth Amendment privilege is not self-executing; even a witness who is compelled to testify must assert the privilege or lose the benefit of it. If he chooses to make disclosures instead of claiming the privilege, the government has not compelled him to incriminate himself. Finally, although the situation presented by custodial interrogation has been held to be an exception to the general rule that one must assert the Fifth Amendment privilege in order to benefit from its protections, the extraordinary safeguard of requiring specific warnings and a voluntary waiver of Fifth Amendment rights as a prerequisite to custodial interrogation was not a basis for the state court's decision, nor is it applicable to the circumstances of this case. Respondent's disclosures to the probation officer therefore did not constitute a form of compelled self-incrimination in violation of respondent's Fifth Amendment privilege.

ARGUMENT

I. RESPONDENT'S INTERVIEW WITH THE PROBATION OFFICER WAS NOT COMPELLED

When the investigator from the public defender's office did not arrive for respondent's presentence interview on time, respondent was faced with the choice of speaking to the probation officer at the designated time or forgoing the interview. That choice did not constitute a form of coercion sufficient to render respondent's statements involuntary in viola-

tion of his Fifth Amendment privilege (Pet. App. 6a).[2]

What the Fifth Amendment privilege proscribes is not the necessity to make difficult choices, but "genuine compulsion of testimony." *United States* v. *Washington*, 431 U.S. 181, 187 (1977) (quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974)). That compulsion exists only in situations in which official actions "overbear [defendant's] will to resist and bring about confessions not freely self-determined" (*Beckwith* v. *United States*, 425 U.S. 341, 348 (1976)). Cf. *Colorado* v. *Connelly*, No. 85-660 (Dec. 10, 1986), slip op. 9 ("coercive police activity

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[2] We do not dispute that respondent enjoyed the protection of the Fifth Amendment privilege, despite the fact that he had been convicted on his plea of nolo contendere. As this Court noted in *Estelle* v. *Smith*, 451 U.S. 454, 462-463 (1981), the availability of the Fifth Amendment privilege turns on the nature of the statement and the exposure it invites, not on the type of proceeding in which the privilege is asserted. See *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984). A convicted but unsentenced defendant may often retain Fifth Amendment rights, even with regard to the subject matter of his conviction, for two reasons. First, any admissions he makes may subject him to enhanced punishment. See *United States* v. *Paris*, 812 F.2d 471, 475 (9th Cir. 1987); *United States* v. *Miller*, 771 F.2d 1219, 1235 (9th Cir. 1985); *United States* v. *Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir.), cert. denied, 439 U.S. 1005 (1978); *United States* v. *Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973); *United States* v. *Domenech*, 476 F.2d 1229, 1231 (2d Cir.), cert. denied, 414 U.S. 840 (1973). Second, he may be exposed to the hazards of self-incrimination with respect to possible prosecution for other crimes, either in that jurisdiction or others. See *United States* v. *Rodriguez*, 706 F.2d 31, 36-37 (2d Cir. 1983); *United States* v. *Yurasovich*, 580 F.2d 1212, 1218 (3d Cir. 1978); *United States* v. *Pierce*, 561 F.2d 735, 738-739 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978).

is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment"); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 223-227 (1973) (concept of voluntariness requires consideration of totality of circumstances to determine whether defendant's "will has been overborne and his capacity for self-determination critically impaired"). The choice that the probation officer gave to respondent was not even remotely coercive under that standard.

This Court has repeatedly held that the Fifth Amendment privilege does not protect an individual from being faced with hard choices as to whether to exercise the privilege. The Court summarized a number of those choices in *McGautha* v. *California*, 402 U.S. 183 (1971). Thus, a criminal defendant must decide whether to testify in his own defense, knowing that if he does, he will then be subject to cross-examination, and that he may be impeached by proof of prior convictions or the like. *Id.* at 215; see, *e.g.*, *Brown* v. *United States*, 356 U.S. 148 (1958); *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316 (1900); *Spencer* v. *Texas*, 385 U.S. 554, 561 (1967); *United States* v. *Havens*, 446 U.S. 620, 627-628 (1980). A defendant whose motion for judgment of acquittal is denied at the close of the government's case must decide whether to put on a defense, knowing that if he does, he runs the risk of bolstering the government's case enough to support a guilty verdict. *McGautha* v. *California*, 402 U.S. at 215. And a defendant must choose between remaining silent and subjecting himself to cross-examination by testifying in order to present an affirmative defense. *Id.* at 216; *Williams* v. *Florida*, 399 U.S. 78, 84 (1970); *Barnes* v. *United States*, 412 U.S. 837, 846-847

(1973). Even though each of these choices is difficult, the Court has held that the government does not violate the Fifth Amendment by requiring the defendant to make them.[3]

The Court's decision in *McGautha* is especially pertinent to this case. In *McGautha*, the Court rejected the defendant's claim that the state's single-verdict procedure, where guilt and punishment are both determined by a jury at a single trial, unlawfully compelled the defendant to become a witness against himself on the issue of guilt because of the risk that he might be sentenced to death without having addressed the sentencing body. The Court concluded that this was simply one more of the hard choices routinely faced by criminal defendants (42 U.S. at 213):

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. *McMann* v. *Richardson*, 397 U.S. [759,] 769 [(1970)]. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The

[3] See also *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). The Court there held that a state could constitutionally impeach a testifying defendant with his silence at the time of his arrest. The Court noted (*id.* at 236) that "[i]t can be argued that a person facing arrest will not remain silent if his failure to speak later can be used to impeach him." The Court pointed out, however, that the Constitution "does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights'" (*ibid.*, quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30 (1973)).

> threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

Based on this analysis, the Court in *McGautha* rejected "the suggestion that a desire to speak to one's sentencer unlawfully compels a defendant in a single-verdict capital case to incriminate himself" (402 U.S. at 216). The fact that a defendant's sentence, rather than his guilt, was at issue did not "call for a difference in constitutional result" (402 U.S. at 216-217). Accordingly, the Court concluded that the policies of the privilege against compulsory self-incrimination are not offended when a defendant in a capital case "yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt" (402 U.S. at 217).

If, as the Court concluded in *McGautha*, the policies of the Fifth Amendment privilege are not offended when the defendant "yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt" (402 U.S. at 217), it follows a fortiori that the Fifth Amendment is not violated when a defendant in a non-capital case yields to the far less compelling pressure of participating in the presentence interview lest he lose his opportunity to tell his side of the story to the probation officer. This is particularly true in light of the fact that even if respondent had chosen not to participate in the interview, he would still have been able to "speak to [his] sentencer" (*McGautha*, 402 U.S. at 216) by exercising his right of allocution. Thus, the only pressure that the probation officer's choice exerted on respondent stemmed from respondent's perception that by failing to participate in the interview, he might reduce his prospects that the probation offi-

cer would write a favorable sentencing report.[4] That is not enough to render respondent's interview with the probation officer the product of compulsion.[5]

II. RESPONDENT'S STATEMENTS TO THE PROBATION OFFICER WERE VOLUNTARY

Even if this Court concludes, contrary to our submission, that the presentence interview was compelled, respondent's statements were nonetheless vol-

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[4] Because the probation officer's refusal to reschedule the presentence interview did not prevent respondent from addressing the sentencing court, this case is not analogous to *Brooks* v. *Tennessee*, 406 U.S. 605 (1972), in which the Court struck down a state statute that required that the defendant testify immediately after the close of the state's case, or not at all. In *Brooks*, the consequence of the defendant's refusal to testify at the outset of the defense case was that the defendant lost all opportunity to testify at trial. In this case, by contrast, respondent lost only the opportunity to influence the probation officer's report.

Although there is no claim in this case that the presentence interview was improperly scheduled, the Vermont Supreme Court apparently assumed that respondent had the right to demand additional time for legal consultation (Pet. App. 5a-6a). If, under state law, respondent had a right to such a "continuance," so that the probation officer erred in refusing to postpone the interview, respondent might have a right—conferred, if at all, only by state law—to be reinterviewed if he had declined to be interviewed and been incorrectly deprived of his right to a subsequent interview by the probation officer's error. His decision to proceed with the scheduled interview, however, rendered consideration of that question unnecessary.

[5] This case is a far cry from *Jones* v. *Cardwell*, 686 F.2d 754 (9th Cir. 1982), on which the state court relied. In that case, the defendant was told that he had no choice but to answer the probation officer's questions during the presentence interview; in this case, by contrast, respondent was offered the choice—albeit not on the terms he preferred—and he decided to exercise his option to participate in the interview.

untary and therefore were not obtained in violation of respondent's privilege against compulsory self-incrimination. When the probation officer presented respondent with the choice of participating in the scheduled interview or forgoing the opportunity of being interviewed, respondent decided to be interviewed, and he answered all the questions put to him without objection. Accordingly, his responses to the probation officer's questions—even if incriminating—were not involuntary.

The Vermont Supreme Court ignored the important distinction between compulsion to participate in the interview and the voluntary decision to make incriminating statements without asserting the privilege. It is quite clear from this Court's cases that the mere obligation to appear and answer questions does not make otherwise voluntary statements compelled ones within the meaning of the Fifth Amendment. The Fifth Amendment privilege does not confer on a witness an absolute right to refuse to respond to a grand jury summons or a subpoena to testify at trial.[6] But a witness in either proceeding has not been compelled to answer within the meaning of the Fifth Amendment unless he is required to answer specific incriminating questions despite a valid claim of the privilege. *United States* v. *Mandujano*, 425 U.S. 564, 572-575 (1976) (plurality opinion). Similarly, a taxpayer is certainly compelled to file a tax return, but that requirement does not mean that he is compelled to engage in a self-incriminatory act in the course of completing the return. *Garner* v. *United States*, 424 U.S. 648, 650-656 (1976); *United States* v. *Sullivan*, 274 U.S. 259 (1927). And a pro-

[6] In contrast, respondent was offered the option of not participating in the presentence interview.

bationer who is required to report to his probation officer and answer questions truthfully is not thereby compelled to incriminate himself. *Minnesota* v. *Murphy*, 465 U.S. 420, 427 (1984). The question is what happens when the witness under compulsion to testify is asked incriminating questions.

At that point, the general rule is that such a witness, once asked incriminating questions, must claim the protection of the privilege or he will not be considered to have been compelled. "[I]f a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Garner* v. *United States*, 424 U.S. 648, 654 (1976) (footnote omitted). As the Court has explained, "[t]he Fifth Amendment privilege against compelled self-incrimination is not self-executing. At least where the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion." *Roberts* v. *United States*, 445 U.S. 552, 559 (1980); *Minnesota* v. *Murphy*, 465 U.S. at 427, 429 (the same rule applies to a witness who is confronted with questions that the government should reasonably expect will elicit incriminating evidence); *United States* v. *Mandujano*, 425 U.S. at 574-575 (quoting *United States* v. *Monia*, 317 U.S. 424, 433 (1943) (Frankfurter, J., dissenting)).

Respondent's decision to participate in the interview and to answer all the probation officer's questions, without claiming his privilege when the probation officer inquired about his drug-related activities, precludes his belated assertion that the disclosures he made in response to those inquiries were compelled. The district court thus could properly rely upon those

disclosures in determining the appropriate sentence to impose on respondent.

III. THE FAILURE TO REMIND RESPONDENT OF HIS FIFTH AMENDMENT PRIVILEGE CREATES NO PRESUMPTION THAT HIS ADMISSIONS WERE COMPELLED

An exception to the general rule that the Fifth Amendment privilege must be claimed is the requirement of *Miranda* v. *Arizona*, *supra*, that incriminating statements obtained during custodial interrogation must be excluded unless the suspect failed to claim the Fifth Amendment privilege after being specifically advised of his right to remain silent and of the consequences of his failure to assert it. The Court has made it clear, however, that this exception "does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Roberts* v. *United States*, 445 U.S. at 560; see also *Minnesota* v. *Murphy*, 465 U.S. at 429-430. This case does not involve such a context.

Although the Vermont Supreme Court did not rely on *Miranda* v. *Arizona*, *supra*, its decision might be explained under this Court's cases interpreting the *Miranda* doctrine (see, *e.g.*, *Mathis* v. *United States*, 391 U.S. 1 (1968); *Minnesota* v. *Murphy*, 465 U.S. at 429-430) on the theory that, because respondent's statements were taken while he was in custody and because the probation officer failed to advise him of his *Miranda* rights, those statements were inadmissible in any judicial proceeding.[7] "Failure to admin-

[7] It is quite clear that this is not the basis on which the court in fact decided the case. Not only did the court fail to mention *Miranda* or its progeny, but it also mentioned only in passing that defendant was incarcerated, and it said

ister *Miranda* warnings [when they are required] creates a presumption of compulsion." *Oregon* v. *Elstad*, 470 U.S. 298, 307 (1985). This rationale assumes that *Miranda* applies in this situation, when in fact it does not.[8]

This Court's decision in *Miranda* was premised on the assumption that custodial police interrogation presents a special risk of pressures that may violate the prohibition against compelled self-incrimination. The Court emphasized that the purpose of the warnings prescribed in *Miranda* is to protect against these pressures, and that warnings therefore are not required in every case of official questioning (384 U.S. at 477, 478). The warnings must be administered only when "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" (*id.* at 444 (footnote omitted)). The Court subsequently has made clear that the proper inquiry for determining when a suspect is in police custody is "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v.

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nothing about whether *Miranda* warnings—or any other warnings—were given. The record does not reveal that any such warnings were given.

[8] The anomaly of applying the *Miranda* rationale to this case is demonstrated by the fact that the state court faulted the probation officer for offering to do precisely what *Miranda* requires—to terminate the interview when the defendant states that he wishes the advice of counsel before proceeding. Nothing in *Miranda* suggests any further obligation to resume the questioning later. See *Michigan* v. *Mosley*, 423 U.S. 96 (1975).

Beheler, 463 U.S. 1121, 1125 (1983) (quoting *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977)).

Miranda involved police questioning of individuals suspected of criminal activity who were not otherwise subject to confinement. Respondent, however, was incarcerated because he had already been convicted; he was not in any special custodial status for the purpose of or in connection with investigative questioning, the setting for which *Miranda* was intended.

An inmate who is questioned for some purpose without the imposition of any additional restraints on his liberty is not in the same position for purposes of *Miranda* as a suspect who was previously at liberty and is taken into custody for the purpose of questioning. The courts of appeals have recognized that "[a] rational inmate will always accurately perceive that his ultimate freedom of movement is absolutely restrained and that he is never at liberty to leave an interview conducted by prison or other government officials" (*United States* v. *Conley*, 779 F.2d 970, 973 (4th Cir. 1985), cert. denied, No. 85-6467 (Oct. 6, 1986)). Thus, application of the traditional standard for determining whether an interviewee is in custody for purposes of *Miranda* "would be tantamount to a *per se* finding of 'custody'" for prison inmates. *Ibid.*; see also *Cervantes* v. *Walker*, 589 F.2d 424, 427-428 (9th Cir. 1978) (application of the traditional "'free to leave'" standard would "lead to the conclusion that all prison questioning is custodial because a reasonable prisoner would always believe he could not leave the prison freely," thus leading to "the illogical position of providing greater protection to a prisoner than to his nonimprisoned

counterpart"). This result would be wholly inappropriate.[9]

A prison inmate, of course, enjoys no freedom of movement. The restraints upon a prisoner's liberty that are a constant of everyday prison life become familiar to the inmate and are therefore unlikely to have the coercive effect that the *Miranda* warnings are designed to dispel. Such a coercive effect will arise in the prison context only when an inmate's liberty has been restricted in some manner that is different from the restraints that are a consistent feature of prison life. As the Ninth Circuit has observed, "[i]n the prison situation, [the concept of restriction of the suspect's freedom] necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. * * * [W]e look to some act which places further limitations on the prisoner." *Cervantes* v. *Walker*, 589 F.2d at 428; accord *United States* v. *Cooper*, 800 F.2d 412, 414-415 (4th Cir. 1986); *United States* v. *Conley*, 779 F.2d at 972-974; *United States* v. *Scalf*, 725 F.2d 1272, 1275-1276 (10th Cir. 1984); *United States* v. *Hayes*, 646 F. Supp. 146, 149-151 (N.D. Ind. 1986). For these reasons, a prison inmate should be deemed to be in custody for purposes of *Miranda* only if he is subjected to more

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[9] *Miranda* itself states that it was "not intended to hamper the traditional function of police officers in investigating crime" and that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by [the] holding" (384 U.S. at 477). Failure to modify the definition of "custody" to take account of the special circumstances of the prison setting would deprive prison administrators of this leeway accorded by *Miranda* itself.

than the usual restraint on his liberty to depart (*Cervantes* v. *Walker*, 589 F.2d at 428).

We do not believe that a contrary result is required by this Court's decision in *Mathis* v. *United States*, 391 U.S. 1 (1968). In *Mathis*, an inmate incarcerated in a state prison was interviewed by an agent of the Internal Revenue Service about possible federal income tax violations. The agent did not administer *Miranda* warnings before initiating the questioning. This Court reversed the inmate's subsequent conviction for filing false tax returns on the ground that incriminating statements made in the course of the interview should not have been admitted at trial. The Court rejected the government's argument that *Miranda* is applicable "only to questioning [of] one who is 'in custody' in connection with the very case under investigation" (391 U.S. at 4-5).

To be sure, the Court's brief opinion in *Mathis* can be read as establishing a per se rule that an inmate who is subject to questioning is automatically 'in custody' and is therefore entitled to *Miranda* warnings merely by virtue of his status as a prisoner. We believe, however, that *Mathis* is better understood as simply rejecting the government's competing per se rule that *Miranda* should not be applicable to an inmate who is in custody in connection with a case other than the one under investigation. Several courts of appeals have interpreted *Mathis* in that fashion. See *United States* v. *Conley*, 779 F.2d at 972; *Cervantes* v. *Walker*, 589 F.2d at 427; see also *United States* v. *Wiggins*, 509 F.2d 454, 459-460 (D.C. Cir. 1975). Under that interpretation, a prisoner is not put in a better position than an ordinary citizen by being entitled to *Miranda* warnings prior to questioning of any sort, regardless of the setting.

On the other hand, the prisoner is not put in a worse position than unincarcerated persons, since he is entitled to *Miranda* warnings if the normal circumstances of his confinement are changed for purposes of the interview in question.[10]

There was no such additional restraint here. Indeed, both the probation officer and respondent acted on the understanding that the presentence interview was an *opportunity* offered to respondent, not an incident of incarceration to which he was required to submit. That understanding of the situation also underlies the Vermont Supreme Court's analysis—the "coercive" threat, in its view, was the threat that respondent would "forfeit" the opportunity to have the interview at a later date (Pet. App. 6a). The interview was thus viewed as a chance for respondent to benefit himself, not as an obligation or an imposition on him.[11]

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[10] Formal investigative questioning of an inmate typically results in a change in the normal circumstances of the inmate's confinement that may justify a finding that the inmate was in custody for *Miranda* purposes. That was the case in *Mathis*, and it was also the case in several of the court of appeals cases that have held *Miranda* applicable to interrogation of a prison inmate. See *Battie* v. *Estelle*, 655 F.2d 692, 699 (5th Cir. 1981) (defendant awaiting trial in county jail was entitled to *Miranda* warnings when he was examined by a court-appointed psychologist); *Palmigiano* v. *Baxter*, 510 F.2d 534, 536-537 (1st Cir. 1974), rev'd on other grounds, 425 U.S. 308 (1976) (*Miranda* warnings required when incarcerated suspect was interviewed in connection with prison disciplinary proceeding); see also *Estelle* v. *Smith*, 451 U.S. 454, 466-469 (1981) (warnings must precede court-ordered psychiatric examination of prisoner).

[11] In the federal system, the offender's cooperation with the probation office may often be a critical factor for the sentencing court when there is a question whether to place an offender

Moreover, the presentence interview does not involve the sort of risk of intimidation or trickery presented by police interrogation upon which *Miranda* was based. See, *e.g.*, *United States* v. *Mandujano*, 425 U.S. at 579-580. The presumption "that without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent" (*Garner* v. *United States*, 424 U.S. at 657), is simply inapplicable here, where the probation officer was faulted precisely for offering respondent the option of remaining silent.

There is no suggestion that the course or contents of the interview itself were in any way affected by the fact that petitioner attended the interview while he was incarcerated, rather than released pending sentencing. In the absence of any such suggestion, the fact that defendant is incarcerated rather than released pending sentencing should not make the interview itself custodial interrogation. The Ninth Circuit has recognized this, holding that "[n]othing in the record suggests that * * * presentence interviews

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on probation or impose a term of imprisonment. In the *Sentencing Guidelines & Policy Statements for the Federal Courts* submitted to Congress and the President on April 13, 1987, the United States Sentencing Commission has formalized consideration of this factor. The guidelines provide that the court may reduce the offense level by two levels, depending upon the nature of the case and manner and extent to which the defendant acknowledged responsibility. In making this determination, one factor the guidelines suggest that the court look to is whether the defendant made "voluntary and truthful admission to authorities of involvement in the offense and related conduct." See Section 3E1.1 and commentary to that section. It is thus apparent why an offender is likely to regard a presentence interview as an opportunity to have a favorable influence on the disposition of his case.

in general[] entail pressures at all similar to those 'which the *Miranda* court found so inherently coercive as to require its holding.'" *Baumann* v. *United States*, 692 F.2d 565, 577 (1982) (quoting *Beckwith* v. *United States*, 425 U.S. 341, 341, 347 (1976)). The Fifth Circuit agrees (*Brown* v. *Butler*, 811 F.2d 938, 941 (1987)). Cf. *United States* v. *Dickson*, 712 F.2d 952, 955 (5th Cir. 1983) (no violation of Fifth Amendment privilege when presentence report comments unfavorably on defendant's refusal to cooperate with federal agents). Several state cases have reached the same result.[12]

As *Baumann* and *Brown* recognize, *Estelle* v. *Smith*, 451 U.S. 454 (1981), is not inconsistent with this analysis. There, this Court concluded that statements an incarcerated defendant made to a psychiatrist in the course of a court-ordered pretrial competency examination could not be used to support imposition of the death penalty because the defendant was not informed of his right to remain silent. The error in *Estelle* was that statements made in the course of a routine competency examination were later used to persuade the jury to impose the death penalty. The Fifth Amendment privilege was implicated only because the State "used respondent's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty." 451 U.S. at 466. There was no such trickery involved here. Respondent chose to discuss his prior offenses with the probation officer conduct-

[12] *Burch* v. *State*, 450 N.E.2d 528 (Ind. 1983) (Miranda warnings not required at presentence interview; does not disclose whether defendant was incarcerated); *Commonwealth* v. *Burton*, 451 Pa. 12, 14, 301 A.2d 675, 677 (1973) (same); *Booth* v. *Commonwealth*, 675 S.W.2d 856 (Ky. 1984) (same).

ing the presentence interview. Unlike the respondent in *Estelle*, he could scarcely have been under any misapprehension as to the use that might be made of his statements. Cf. *Minnesota* v. *Murphy*, 465 U.S. at 432-433 (probationer has no reasonable expectation that statements to probation officer will remain confidential). *Estelle* indicates that the routine use of statements made in a competency hearing for the purpose for which they are intended is constitutionally unobjectionable. 451 U.S. at 465. The routine use of presentence interview statements for the purpose for which they are intended is similarly constitutionally acceptable.

CONCLUSION

The judgment of the Vermont Supreme Court should be reversed.

Respectfully submitted.

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